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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

BRANDON S. GONZALEZ,

Defendant and Appellant.

D073035

(Super. Ct. No. SCN357947)

APPEAL from a judgment of the Superior Court of San Diego County,  
Sim Von Kalinowski, Judge. Affirmed.

Mary Woodward Wells, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant  
Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A.  
Sevidal and Stacy A. Tyler, Deputy Attorneys General, for Plaintiff and  
Respondent.

## I.

### INTRODUCTION

The People charged Brandon S. Gonzalez with forcible rape (Pen. Code, § 261, subd. (a)(2))<sup>1</sup> (count 1), sodomy by use of force (§ 286, subd. (c)(2)(A)) (count 2), forcible oral copulation (§ 288a, subd. (c)(2)(A)) (count 3), first degree burglary (§§ 459, 460, subd. (a)) (count 4), infliction of corporal injury to a roommate (§ 273.5, subd. (a)) (count 5), assault by means likely to produce great bodily injury (§ 245, subd. (a)(4)) (count 6), false imprisonment (§§ 236, 237, subd. (a)) (count 7), and cruelty to a child by endangering health (§ 273a, subd. (b)) (count 8). The People alleged that these crimes were all committed on or about February 20 and February 21, 2016. The People also charged Gonzalez with infliction of corporal injury to a roommate (§ 273.5, subd. (a)) (count 9), assault by means likely to produce great bodily injury (§ 245, subd. (a)(4)) (count 10), and false imprisonment (§§ 236, 237, subd. (a)) (count 11), based on acts committed on or about July 7, 2013.

The People further alleged that Gonzalez committed the rape (count 1) during the commission of a first degree burglary with the intent to commit rape (§ 667.61, subds. (a), (c), (d)) and that during the commission of the burglary (count 4), someone other than an accomplice was present (§ 667.5, subd. (c)(21)).

A jury found Gonzalez guilty of counts 1 through 3, 5, 6, and 8 through 11. The jury found Gonzalez not guilty of count 4 (burglary) and found not true the allegation

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<sup>1</sup> All subsequent statutory references are to the Penal Code, unless otherwise specified.

attached to count 1 that the charged crime was committed during a burglary with the intent to commit rape. The jury did not reach a verdict on count 7. After the court declared a mistrial as to that count, the People dismissed the charge.

The trial court sentenced Gonzalez to a total term of 29 years in prison, comprised of consecutive terms of eight years on counts 1 through 3, a consecutive four-year term on count 5, and a consecutive one-year term on count 9. The court also imposed a concurrent sixteen-month term on count 11, and a six-month term, with credit for time served, on count 8. The court stayed execution of the sentences on counts 6 and 10 pursuant to section 654.

On appeal, Gonzalez claims that the trial court erred in failing to stay execution of the sentence for the conviction of the February 2016 infliction of corporal injury on a roommate (§ 273.5, subd. (a)) (count 5) pursuant to section 654. Gonzalez claims that a stay of sentence was required because his commission of this offense was part of an indivisible course of conduct that included the commission of three forcible sex offenses (counts 1, 2, and 3), and all of the offenses were motivated by a single objective. We affirm the judgment.

## II.

### FACTUAL AND PROCEDURAL BACKGROUND

#### A. *The July 2013 offenses (counts 9–11)*

Gonzalez and victim A.S. dated and lived together. On July 27, 2013, Gonzalez accused A.S. of cheating on him and an argument ensued. During the argument, Gonzalez slammed A.S. to the ground and hit her in the head. Gonzalez tied A.S.'s hands behind her back, dragged her from one room in their residence to another, put socks in her mouth, and choked her.

#### B. *The February 2016 offenses (counts 1–8)*

In December 2015, A.S. had a baby. Gonzalez was the baby's father.

A.S.'s child from a previous relationship was hospitalized in February 2016. A.S. visited the child in the hospital frequently. Gonzalez angrily accused A.S. of cheating on him with one of the doctors at the hospital.

On February 20, 2016, A.S. and Gonzalez exchanged text messages while she was at the hospital. Since she had recently given birth, A.S. had not been able to have sexual intercourse with Gonzalez for several weeks. Gonzalez was anxious to have sex, and A.S. wanted to please him. In the texts, Gonzalez told A.S. that he had purchased alcohol and that he was looking forward to having sex with her. After A.S. texted that she was unwilling to engage in some of the sexual activities that Gonzalez proposed and that she did not want Gonzalez to drink alcohol, Gonzalez responded angrily and called A.S. a "fucking slut." Gonzalez continued to send A.S. texts while she was at the

hospital expressing both sexual and hostile emotions.

A.S. returned home from the hospital with her daughter sometime between 6:00 and 7:00 that evening. Gonzalez was at the residence when they arrived. He smelled of alcohol and began yelling at A.S. A.S.'s mother arrived at the residence and told Gonzalez to leave. Gonzalez complied. After leaving the residence, Gonzalez texted A.S. repeatedly, calling her a "slut" and a "whore," and making numerous other disparaging comments.

A.S.'s mother left A.S.'s residence between 9:00 and 10:00 p.m. At approximately 10:00 p.m. that night, Gonzalez returned to A.S.'s residence. He entered A.S.'s room and began punching her in the head, while she was nursing the baby. Gonzalez yelled at A.S. to put the baby down. A.S. complied.

Gonzalez pulled off A.S.'s pants and kicked and hit her repeatedly in the buttocks while she tried to soothe the baby. Gonzalez pulled A.S. by her hair and dragged her into the bathroom. Once there, he forced her to orally copulate him. When she told him to stop, he punched her in the head. A.S. decided to stop resisting.

The baby began crying. Gonzalez ordered A.S. to quiet the child. While A.S. tried to quiet the baby, Gonzalez punched her repeatedly in the face. On one of these occasions, Gonzalez's hand grazed the baby's face. A.S. put the baby in the crib.

Gonzalez pushed A.S. over the bed, face down, and, according to A.S., "shoved" his penis into her anus. When she tried to resist, he kicked, punched, and struck her with a hard, plastic toy gun.

At some point, Gonzalez also began beating A.S. with a hanger. He moved her to

a different part of the bed and put his penis in her vagina. Throughout his commission of these sex acts, he continued to beat her buttocks. Gonzalez had vaginal sex with A.S. several more times throughout the night. On none of the occasions did A.S. consent to the sexual acts. Gonzalez left the next morning.

During the ensuing investigation, Gonzalez admitted both that A.S. may have engaged in some of the sexual acts out of fear and that he had hit her numerous times throughout the encounter.

### III.

#### DISCUSSION

*The trial court did not err in failing to stay execution of the sentence for infliction of corporal injury (count 5) pursuant to section 654*

Gonzalez contends that the trial court erred in failing to stay execution of the sentence for infliction of corporal injury (count 5) pursuant to section 654 on the ground that his commission of this offense was part of an indivisible course of conduct that included the commission of three forcible sex offenses (counts 1, 2, and 3) motivated by a singular objective.<sup>2</sup>

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<sup>2</sup> Although Gonzalez failed to raise this section 654 claim in the trial court, "[i]t is well settled . . . that [a] court acts in 'excess of its jurisdiction' and imposes an 'unauthorized' sentence when it erroneously stays or fails to stay execution of a sentence under section 654." (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17.) Accordingly, Gonzalez is not precluded from raising his section 654 claim for the first time on appeal. (See *People v. Flowers* (1982) 132 Cal.App.3d 584, 589 ["The question of the applicability of Penal Code section 654 was not raised at the sentencing hearing, but the absence of any objection does not obviate our duty to review the section 654 question"].)

1. *The trial court's finding that section 654 did not apply*

In imposing a consecutive term on count 5, the trial court expressly found that section 654 did not apply. The trial court stated:

"[S]ection 654 doesn't apply because the assault[ive] conduct towards the victim of slapping her, striking her buttocks, causing the traumatic condition and her black eye, and the extremely bruised buttocks is different conduct than acts in those charged in Counts 1 through 3. Count 5 was committed in addition to Counts 1 through 3."

2. *Governing law and standard of review*

Section 654 provides in relevant part: "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." "The purpose of the protection against multiple punishment is to insure [*sic*] that the defendant's punishment will be commensurate with his criminal liability." (*Neal v. State of California* (1960) 55 Cal.2d 11, 20 (*Neal*).)

In *Neal*, the Supreme Court interpreted the statutory prohibition contained in section 654 to apply to cases in which a defendant engages in an indivisible course of conduct with a single objective that violates several different penal statutes. (See *Neal, supra*, 55 Cal.2d at p. 19.) The *Neal* court explained the manner by which a court is to determine whether a defendant has acted pursuant to an indivisible course of conduct:

"Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be

punished for any one of such offenses but not for more than one."  
(*Id.* at pp. 19–20.)

"If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' "  
(*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

In *People v. Nguyen* (1988) 204 Cal.App.3d 181 (*Nguyen*), the Court of Appeal explained that section 654 does not prohibit the execution of a separate sentence for an offense that involves the use of violence where the violence employed goes far beyond that necessary to carry out some other offense:

"[A]t some point the means to achieve an objective may become so extreme they can no longer be termed 'incidental' and must be considered to express a different and more sinister goal than mere successful commission of the original crime.

"[¶] . . . [¶]

"[S]ection [654] cannot, and should not, be stretched to cover gratuitous violence or other criminal acts far beyond those reasonably necessary to accomplish the original offense." (*Id.* at p. 191.)

In reviewing a trial court's finding that section 654 does not apply, we determine only whether there is substantial evidence to support the trial court's finding. (See *People v. Osband* (1996) 13 Cal.4th 622, 730–731.)



### 3. *Application*

The trial court's finding that section 654 did not require the court to stay execution of the sentence on count 5 is clearly supported by substantial evidence. As the People argue on appeal, the record is replete with evidence that Gonzalez committed acts of violence far beyond that needed to accomplish the sexual offenses charged in counts 1 through 3. For example, A.S. testified that Gonzalez hit and kicked her numerous times and that he beat her with numerous objects over a period of many hours. Indeed, A.S. testified that Gonzalez continued to hit and punch her even after his penis was inside her anus. In addition, Gonzalez admitted to police both that A.S. "complied right away" with his demands and that he had hit her approximately 20 times throughout the night. In short, the evidence overwhelmingly establishes that Gonzalez committed "gratuitous [acts of] violence," far beyond any acts necessary to complete the sexual offenses. (*Nguyen, supra*, 204 Cal.App.3d at p. 191.)

We are not persuaded by Gonzalez's argument that the trial court was required to apply section 654 because his only objective in committing the infliction of corporal injury offense charged in count 5 and the sexual offenses charged in counts 1 through 3 was to "punish" the victim. While it is clear that Gonzalez was motivated in part by anger and hostility in committing the offenses, the trial court could have reasonably found that Gonzalez harbored a distinct *sexual* objective in committing the sexual offenses charged in counts 1 through 3, based on A.S.'s testimony that Gonzalez had a strong interest in having sex with her around the time of the offenses, sent A.S. texts of a sexual nature prior to the commission of the offenses, committed different types of sexual

offenses against A.S., committed numerous sexual offenses against A.S., and sent A.S. a text after the crimes in which he described the events as "the best sexual experience" he had ever had. Thus, while Gonzalez argues that his "objective that night was not sexual gratification," based on the evidence discussed above, the trial court could have reasonably found that Gonzalez *did* harbor a sexual objective in committing counts 1 through 3 that was distinct from the assaultive and punitive intent that he harbored in committing the corporal injury to a roommate offense charged in count 5.

Accordingly, we conclude that the trial court did not err in failing to stay execution of the sentence for infliction of corporal injury pursuant to section 654.

#### IV.

#### DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

GUERRERO, J.